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No. 82-786

In The

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN DOE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Government can compel an individual to produce his incriminating records before a grand jury, which production would be incriminatory, admitting ownership, existence, location and authentication of the records when the individual claims the protection of the Fifth Amendment.

2. Whether the Government can compel an individual to accept "the functional equivalent of use immunity" where they refused to advise the District Court the scope of the immunity, the procedures to be utilized and failed to obtain an order granting immunity pursuant to 18 U.S.C. §6001, *et seq.*, to override the individual's Fifth Amendment rights.

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BRIEF IN OPPOSITION FOR RESPONDENT

Respondent submits this brief in opposition to the Government's petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 680 F. 2d 327 (Pet. App. 1a-21a). The opinion of the District Court is unreported (Pet. App. 23a-27a).

JURISDICTION

The Government invokes the jurisdiction of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

STATEMENT OF THE CASE AND FACTS

In November and December, 1980, five separate grand jury subpoenaes were served on respondent, the target of a grand jury investigation. These subpoenaes commanded respondent in his personal capacity to appear before a grand jury and produce various documents and records all relating to respondent personally and to his sole proprietorships.

On November 19, 1980, the grand jury issued two subpoenaes to respondent requiring production of (1) the telephone toll records of several companies of which he is sole proprietor, and (2) "all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present" for four accounts held by respondent or his proprietorships (Pet. App. 28a-31a).

On November 25, 1980, the grand jury issued a subpoena to respondent calling for production of "any and all records as per the attached Schedule A for (a named proprietorship) for the period January 1, 1976 to present." Schedule A lists twenty-eight items, including such documents as general ledgers, general journals, paid bills, invoices, payroll records, contracts and copies

of contracts (including all retainer agreements), tax returns, safe deposit box records, all W-2 forms for each partner, associate and employee workpapers (Pet. App. 32a-33a). A fourth subpoena was issued on December 19, 1980, seeking access to a laundry list of documents relating to another proprietorship (Pet. App. 34a).

Finally, on December 29, 1980, the grand jury directed respondent to produce "any and all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts of his proprietorships maintained at certain banks (Pet. App. 36a).

In early January, 1981, respondent moved to quash the above subpoenaes on the grounds that the compelled production of the records would violate his rights against self-incrimination under the Fifth Amendment. The Government conceded at oral argument on the motion that the records sought relate to sole proprietorships of respondent, that they are in his possession and that the records will or may incriminate respondent (C.A. App. 27a-29a).

By opinion of February 4, 1981, the District Court granted substantially all the relief sought by respondent, excepting only records required to be kept by law produced (Pet. App. 23a-27a). In quashing the subpoenaes, the District Court held the act of producing the records to have communicative aspects which warrant Fifth Amendment protection.

On February 19, 1981, the Government moved for reconsideration and after briefs and oral argument and by order of April 8, 1981, said motion was denied (C.A. App. 135a).

The Court of Appeals affirmed holding the "enforcement of these subpoenaes would result in a compelled testimonial

communication, an outcome neither compatible with the fifth amendment nor consonant with *Fisher*"* (Pet. App. 17a).

First the court rejected the Government's argument that it must consider the size of the organization the records are subpoenaed from and if of sufficient size find a separate entity and apply those cases dealing with documents held by representatives of a collective group. The court stated:

> In *Bellis, supra,* the Supreme Court made it clear that, in evaluating a fifth amendment claim, the critical factor was not the *size* of the organization the records of which were being subpoenaed, but rather the *nature* of the capacity — either personal or representational — with respect to which the privilege was claimed. The *Bellis* Court drew "a bright line between organizations which have 'a recognizable juridical existence apart from [their] members,' " such as corporations or partnerships, and "those which do not," such as sole proprietorships (citations omitted). While extending the *Wilson* line of cases to a partnership, on the ground that a partnership constituted an "organized, institutional activity," 417 U.S. at 92, the Justices explicitly declined to conclude that the same would be true with respect to sole proprietorships:
>
> > It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled

* *Fisher v. United States,* 425 U.S. 391 (1976).

> production of his personal papers and effects as well as compelled oral testimony. . . . *The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life.*

Id. at 87-88 (emphasis added)

(Pet. App. 6a, 7a).

The court next applied the rule of *Fisher* finding its three requirements present here. It found production by respondent of the subpoenaed records would result in (1) compulsion of a (2) testimonial communication that is (3) incriminating. Since compulsion was supplied by the subpoena and incrimination was stipulated by the Government, the discussion was concerned with the testimonial communication required by production. The court recognized the two situations found in *Fisher* where production in response to a subpoena has communicative aspects, *i.e.*, (1) an admission of existence of the records and their possession and control by the target and (2) the authentication of the records of the target. As to the first, the court stated:

> In the matter *sub judice,* however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist — or that the appellee

> even is somehow connected to the business entities under investigation — is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary information against himself.

(Footnote omitted, citation omitted.) (Pet. App. 15a, 16a).

As to the second situation, the court noted that since the subpoenaed documents were most likely prepared by respondent they could not be authenticated without respondent's participation. Therefore, responding to the subpoenaes would represent a substantial threat of self-incrimination protectable in this case by the Fifth Amendment.

The court next rejected the Government's argument that respondent's Fifth Amendment claim was a "blanket claim" and not specific (Pet. App. 18a, 19a). The court found even if a "blanket claim" was originally posited it was not upheld by the District Ccourt when it ordered production of all records required to be kept by law.

Finally, the court declined to reach the question of whether an award of use immunity by the Government overrides respondent's Fifth Amendment claim since no offer of immunity was ever solidified or immunity granted (Pet. App. 19a, 20a).

REASONS FOR DENYING THE PETITION

This matter presents a routine application of long standing precedent that an individual cannot be compelled to produce testimony or records and documents in his possession or control which incriminate him. *Boyd v. United States,* 116 U.S. 616 (1886); *Ballmann v. Fagin,* 200 U.S. 186 (1906); *Bellis v. United States,* 417 U.S. 85 (1974); *Fisher v. United States,* 425 U.S. 391 (1976).

See L. Levy, *Origins of the Fifth Amendment,* 390 (1968). Despite the Government's contention, no confusion exists regarding the applicability of the Fifth Amendment to records of the nature sought here and no court has compelled production of similar type records in the face of a Fifth Amendment claim. The question here was not addressed in *Fisher* since there the records sought were not the taxpayer's records but his accountants.

1. (A) All courts of appeals considering the issue, in light of *Fisher,* of whether compelled production by a sole proprietor of his incriminating documents have concluded the Fifth Amendment bars such production. In *In Re Grand Jury Proceedings (Martinez),* 626 F. 2d 1051 (1st Cir. 1980), the court recognized that the compelled production by a doctor of his appointment logs prepared by himself and others under his supervision which are incriminating would produce incriminating authentication testimony and thus be violative of the Fifth Amendment. There, the court remanded the matter to the District Court with instructions to quash the subpoena unless the Government informed the court it granted the taxpayer immunity. 626 F. 2d at 1058. *See also, United States v. Doe,* 628 F. 2d 694 (1st Cir. 1980).

In *United States v. Beattie,* 541 F. 2d 329 (2d Cir. 1976), the Second Circuit refused enforcement of an Internal Revenue Service summons seeking a taxpayer to produce letters he had written to his accountant.

In the Fourth Circuit in *United States v. Penrod,* 609 F. 2d 1092 (4th Cir. 1979), a grand jury subpoena was complied with by a sole proprietor who later at trial contended that introduction of the subpoenaed documents into evidence violated his Fifth Amendment right against self-incrimination. Although the court found a waiver by compliance, it noted that the defendant could have declined to comply based on Fifth Amendment grounds.

In the Fifth Circuit in *United States v. Kent Oil & Gas Company,* 646 F. 2d 963 (5th Cir. 1981), the court affirmed a District Court order quashing a grand jury subpoena to a sole proprietor for his business records on Fifth Amendment grounds *See also, United States v. Davis,* 636 F. 2d 1028 (5th Cir. 1981) ("Any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process regardless of whether they are business-related or more inherently personal in content.") (footnotes omitted) 636 F. 2d at 1043.

In *United States v. Pleasons,* 560 F. 2d 890 (8th Cir. 1977), the defendant, a doctor, sought to suppress his medical records and appointment books surrendered by himself to a grand jury claiming their introduction violated his Fifth Amendment right to self-incrimination. The court affirmed a denial of the suppression motion but stated the doctor could have availed himself of his Fifth Amendment right when served with the subpoena. The court stated "[w]e know thereof no reason why the Fifth Amendment's protection would not have extended to Mr. Pleasons and his private medical papers had he chosen to refuse to produce them." 560 F. 2d at 893.

In the Ninth Circuit in *United States v. Helina,* 549 F. 2d 713 (9th Cir. 1977), the Government's comment in summation on the refusal of the taxpayer to turn over his records to the Internal Revenue Service was an issue. The court, in discussing the comment, found neither *Fisher* nor *Andresen* limited the Fifth Amendment privilege of an individual not to produce incriminating records and disapproved the comment. *See also, United States v. MacKey,* 647 F. 2d 898 (9th Cir. 1981).

Thus, there is no division on the issues in the Courts of Appeals and all Circuits follow *Fisher* and protect a sole proprietor from compelled production of incriminating records and documents.

(B) The distinction drawn below between protection afforded to the records of corporations and partnerships and that afforded to sole proprietors is of long standing historical and legal precedent and is based on the protections afforded an individual as opposed to an artificial entity or a collective group. Records and documents of a sole proprietor are personal in nature since they are merely an extension of the individual. In *Bellis v. United States, supra,* the Court discussed the different treatment afforded individuals and collective groups. The Court stated, in discussing the protection afforded an individual

> As the Court explained in *United States v. White, supra* at 698 "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." (citations omitted)

417 U.S. at 88.

* * *

> These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own

> testimony on personal records." *United States* v. *White, supra,* at 701.

417 U.S. at 89-90.

Insofar as the treatment of representatives of collective groups, the Court stated:

> Since no artificial organization may utilize the personal privilege against compulsory self-incrimination, the Court found that it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege.

417 U.S. at 90.

Moreover, the size of the proprietorship has no bearing on the proprietor's Fifth Amendment right for no matter how large or small the records are still the individual's and not the organization's since the proprietorship has no identity apart from the individual. Any concern with law enforcement effects of this principle are dissipated by the court here.

> Our decision in no way impinges on the legitimate investigatory activities of law enforcement officials. For example, many of the records sought from the appellee in this case no doubt could be obtained by the Government from other sources. Similarly, the appellee would have no right to invoke the fifth amendment if the documents involved were not in his actual or constructive possession. *Couch* v. *United States,* 409 U.S. 322 (1973). Nor could he complain if the documents had been prepared by or obtained from a third party, *Fisher,* or if they

> were seized from his office by investigators bearing valid warrants. *Andresen* v. *Maryland*, 427 U.S. 463 (1976). In this case, however, the Government in effect asks the *appellee himself* to provide it with any and all documents in his possession that might incriminate himself. It is precisely this sort of expedition that the fifth amendment traditionally has been interpreted to prevent.

(Footnote omitted, Pet. App. 17a).

Thus, the size of the proprietorship is irrelevant and no authority exists for treating a sole proprietor as a representative of a collective group.

(C) No anomaly exists between the protection afforded seizure of personal records pursuant to a search warrant and when sought by subpoena or summons. The difference in treatment is grounded on the compulsory authentication on the individual when served with a subpoena. No such compulsion or cooperation is present when documents are seized. In addition to compulsion there are other valid reasons for the distinction in treatment. A subpoena does not require a finding of probable cause by a neutral judicial officer while a search warrant does, thus affording greater protection to the individual. In addition, an individual can deny knowledge of the existence of documents seized during a search, which is hardly feasible when the individual is compelled to produce and authenticate documents. The distinctions that exist are grounded in solid principles which are fundamental in purpose.

(D) Authorship and ownership of the subpoenaed documents were not held to be determinative factors of an individual's Fifth Amendment claim to production of documents in *Fisher*. Rather, the discussion of these factors in *Fisher* related not to a sole proprietor but to an agent holding documents of another, as in

Fisher, the taxpayer holding the accountant's records. There it was clear the taxpayer was neither the author nor owner of the subpoenaed documents while here the court found the documents were "most likely" prepared by respondent and "in all likelihood contain (possibly incriminating) declarations by him." (Pet. App. 15a, 16a).

(E) The Third Circuit correctly applied *Fisher* finding here the act of production of the documents subpoenaed would amount to an incriminating testimonial communication. In *Fisher*, the Court stated:

> "The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It would also indicate the taxpayer's belief that the papers are those described in the subpoena." (Citations omitted). 425 U.S. at 410.

The Court in *Fisher* went on to stress that the accountant's workpapers in the taxpayer's possession did not belong to the taxpayer, were not prepared by him and did not contain his testimonial declaration. The language the Government seizes upon from *Fisher* to bolster their argument that production here does not rise to a testimonial communication is language the Court in *Fisher* used to demonstrate why the privilege was inapplicable there. The significant aspect of *Fisher* is that it recognizes admissions of authentication, possession and existence can all be testimonial communications. Here, the court properly distinguished the language in *Fisher* relied on by the Government. Possession and existence are not conceded here as in *Fisher* and here the production automatically authenticates the documents

as the respondent's. Perhaps other methods of authentication are available to the Government as it suggests but the harm will have already been done in compelling authentication before the grand jury.

2. The problem with the Government's offer of immunity in the District Court is that they to this day refuse to state what is being immunized to assure the Court that the immunity is co-extensive with the privilege. *Kastigar v. United States,* 406 U.S. 441 (1978). If the Government was serious they could have invoked the statutory provisions, 18 U.S.C. §§6002 or 6003, and obtained an order granting immunity. This they did not do. The Third Circuit believed the issue premature and declined to reach the issue whether an award of use immunity in this situation is constitutionally permissible (Pet. App. 19a, 20a). Since the issue was not reached below, it should not be considered here.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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